

## **Surrey Local Pension Board**

### **23 April 2018**

## **Annex 1; Contracted-out (GMP) reconciliation and the recovery of pensioner overpayments**

### **1.1 The background**

The state pension scheme was a two tier pension scheme until 6<sup>th</sup> April 2016; all employees who paid the appropriate National Insurance contributions / received credits qualified for a basic state pension but only employees who paid the full “A” rate contributions qualified for an earnings related top-up pension (initially known as the state earnings related pension scheme [SERPS] but later known as the state second pension [S2P]). The LGPS was contracted out of the upper tier of the state pension and both the employer and the members paid lower National Insurance contributions (“D” rate for members) as a result.

There was a requirement for contracted-out pension schemes to provide pension benefits at least as good as the benefits the member would have built up in the state top-up scheme, and this underpin was known as a guaranteed minimum pension (GMP). However, there was also a benefit to the pension scheme because the state picked up the whole of the cost of index-linking GMP built up between 6<sup>th</sup> April 1978 and 5<sup>th</sup> April 1988 and any increases above 3% for GMPs built up between 6<sup>th</sup> April 1988 and 5<sup>th</sup> April 1997.

Unfortunately, it has emerged that there is a mis-match between the data held by pension schemes and the data held by HMRC and this is one of the drivers behind the GMP reconciliation exercise. This means that some pensions will have been underpaid and some will have been overpaid and, while it is simple to resolve underpayments, it is more complicated to address overpayments - as we shall see.

The LGA recommends waiting until the authority has collated evidence from the GMP reconciliation exercise before determining whether it would be advisable / cost efficient to recover overpayments.

## **1.2 The current position**

- (1) Administering authorities are required to correct any errors they discover as soon as possible as, otherwise, the overpayment could be an unauthorised payment and subject to a tax charge.
- (2) Each administering authority will have their own limitations for writing off payments and procedures for recovering overpayments.

## **1.3 Considerations for the administering authority**

- (i) It is unlikely that members would have been aware that they were being overpaid.
- (ii) The size of the overpayment may be a consideration and in *Capita ATL Pension Trustees Ltd v Gellately* (2011) the High Court decided that it was not necessary to recover relatively modest overpayments (£10,200 in that case) citing the scale, cost effectiveness and the distress caused by doing so.
- (iii) The LGA paper considered the relevance of estoppel but noted that it was an inflexible all or nothing mechanism and the courts had developed a more flexible “change of position” defence.
- (iv) It is not necessary to prove that there had been a representation by one party that the other relied on with change of position - and it only facilitates the recovery of that part of the overpayment in respect of which recipient had changed their position and the requirement to repay would outweigh the injustice of denying the employer / administering authority restitution (*Lipkin v karpnale Ltd* (1991)).
- (v) The Pensions Ombudsman decided that the change of position defence is ineffective if the member would or should have been aware of the error (*Kenny v Teachers’ Pensions*).

#### **1.4 Cost effectiveness and mitigating factors (financial hardship)**

The HM Treasury document “Managing Public Money”, although not specifically intended for local government, lays out general guidance which recommends a thorough cost to benefit analysis before setting out to recover overpayments. It also advises that evidence of financial hardship, as opposed to financial inconvenience, should also be taken into consideration.

#### **1.5 The Limitation Act 1980**

A claim to recover overpayments caused by mistake (or by fraud or deliberate concealment committed by the defendant) has to be made within six years of the date when the mistake, fraud or act of concealment was discovered or, with reasonable diligence, could have been discovered.

#### **1.6 Tax implications**

Administering authorities must correct any errors they discover within a reasonable period of time as, otherwise, they may be treated as unauthorised payments subject to a tax charge under The Registered Pension Schemes (Authorised Payments) Regulations 2009. However, an overpayment would not be treated as an unauthorised payment if it falls within regulations 13 and 14 of the act if the administering authority believed;

- the payment represented a pension payable to a member and
- the recipient was entitled to the amount paid in error;
- however, there is a presumption that once an error has been identified the administering authority will take reasonable steps to prevent further overpayments within a reasonable period of time and
- there is a further exemption (for post 5<sup>th</sup> April 2006 payments) for genuine errors where the total overpayment is less than £250

Detailed guidance on recovering overpayments prepared by the Local Government Association can be found in the link below under sources/background papers.

-----  
**Report contact:** Neil Mason, Head of Pensions (Investments, Funding & Governance)

**Contact details:** T: 020 8213 2739 E: neil.mason@surreycc.gov.uk

**Sources/background papers:** LGA repost on the legal implications of GMP reconciliation;  
<http://lgpslibrary.org/assets/gas/ew/COoverv1.0.pdf>

